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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that Gray's prosecutorial misconduct claim – which Gray never raised in state court – called for the creation of an impermissible "new rule"?

2. Whether Gray's so-called "Brady" claim is properly before the Court? Even if it were properly before the Court, does the claim fail in view of the lack of evidence adduced by Gray at the evidentiary hearing in the District Court?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited in Petitioner's Brief, this case involves Virginia Code § 8.01-654(B)(2), which provides, in pertinent part, that "[n]o writ [of habeas corpus] shall be granted on the basis of any allegation the facts of which Petitioner had knowledge at the time of filing any previous petition."

It also involves Virginia Code § 8.01-654.1, enacted in 1995, which provides as follows:

> No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after the earliest of: (i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, (ii) a decision by the United States Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or (iii) the period for filing a timely petition for certiorari has expired without such a petition being filed.

STATEMENT OF THE CASE

Coleman Wayne Gray was convicted in 1985 in the Circuit Court for the City of Suffolk, Virginia, of the capital murder of Richard McClelland during the course of a robbery while armed with a deadly weapon. For this crime he was sentenced to death. This case arises from the federal habeas corpus review of that sentence.

The evidence at trial showed that, on May 2, 1985, Gray and an accomplice named Melvin Tucker waited in Gray's car at 9:30 p.m. in the parking lot outside a Murphy's Mart store in the City of Portsmouth, Virginia. The manager of the store, Richard McClelland, had fired

Gray's wife on March 8 (C.A.A. 1896)[1], and Gray had told friends he was going to "get" McClelland. Gray had gone to see McClelland about firing his wife, but McClelland had refused to speak with him. Eleven days after Gray's wife was fired, Gray stole a .32 caliber revolver from the home of an acquaintance. (C.A.A. 1885-86). Gray was armed with that gun as he sat outside the store on the night of May 2.

When the store closed, Gray and Tucker saw McClelland leave the store in his automobile. With Gray driving his own car, they followed McClelland and later abducted him at gunpoint, driving him back to the Murphy's Mart. There, they forced him to open the store and they stole gym bags full of money and merchandise belonging to the store. They then drove McClelland to a secluded location where Gray ordered him out of the automobile and made him lie face down on the ground. As McClelland begged Gray not to shoot him, Gray assured him that he would be unharmed, then fired six pistol shots in rapid succession into McClelland's head above and behind his left ear from a distance of three to eighteen inches. Gray told Tucker as they drove away that he had had to kill McClelland because the victim knew him. Returning to the place where they had left McClelland's car, Gray doused the interior of the car with gasoline and set it on fire.

Although both Gray and Tucker initially were charged with capital murder, the Commonwealth soon determined that Gray was the "triggerman." The distinction was crucial because under Virginia law only the triggerman could be convicted of capital murder and sentenced to death. Tucker pled guilty to first degree murder, and testified against Gray at trial. (C.A.A. 505-10).

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[1] Citations to the Appendix filed in the Court of Appeals will be designated as (C.A.A. ___). Citations to the Appendix filed in this Court will be designated as (J.A. ___).

Gray had given a statement to the police wherein he admitted participating in the robbery and murder, but claimed that Tucker had pulled the trigger. (C.A.A. 1833-37). Gray did not testify in the guilt phase of his trial.

A friend of Gray and his wife described at trial how Gray threatened "to get [McClelland], because they had fired his wife," (C.A.A. 1896, 1902), and how Gray had subsequently told her about disposing of the proceeds of the robbery (C.A.A. 1897-98), taking McClelland back to the store to get money from the safes (C.A.A. 1898), and taking McClelland to the murder site where, in her words, Gray said "That's where he did it." (C.A.A. 1899). These facts, as found by the Supreme Court of Virginia, supported the conclusion that Gray, not Tucker, was the triggerman:

> The murder weapon had been stolen by Gray. Gray, not Tucker, was acquainted with McClelland. Because McClelland had fired Gray's wife from her job at Murphy's Mart, Gray had a motive to kill McClelland. Indeed, he told a friend that he was "going to get" McClelland.

(J.A. 95).

Immediately before jury selection began, the defense moved the Court to order the prosecution to disclose the evidence it planned to introduce in the penalty phase if Gray was convicted of capital murder. This motion was based on precatory language from a State Supreme Court opinion that such disclosure was "the preferred practice."[2] Before the court could rule on the motion, the prosecutor voluntarily disclosed that he intended to introduce evidence of statements Gray had made to other people about other crimes he had committed for which he had not been charged or convicted. The defense represented to the court that they had "good reason to believe"

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[2] *See Peterson v. Commonwealth*, 225 Va. 289, 297, 302 S.E.2d 520, 526 (1983), *cert. denied*, 464 U.S. 865 (1983).

that the prosecution would attempt to introduce a statement that Gray had supposedly made to another inmate that he had committed the heinous double murder of Lisa Sorrell and her three-year-old daughter Shanta in a neighboring jurisdiction the previous December. When asked whether he would introduce anything other than statements, the prosecutor replied "To other people, that's correct. Statements made by your client that he did these things." (C.A.A. 1331).

The guilt phase of trial began on a Monday morning and ended on Thursday afternoon with Gray's conviction. The penalty phase began on Friday morning. At the outset of the penalty phase of trial, defense counsel moved the court for a ruling on the scope of evidence to be admitted. He stated that the prosecutor had informed the defense on Monday morning that he would present testimony that Gray had told someone that he had committed the Sorrell murders. Counsel stated that the defense *was prepared for this evidence*, "argumentatively and evidentiary-wise." (C.A.A. 2064). He stated, however, that the prosecutor had informed the defense the previous evening that he also planned to present photographs of the Sorrell murder victims, autopsy reports, and the testimony of Chesapeake Police Detective Michael Slezak describing the scene of the Sorrell murders. Counsel claimed they had not been given sufficient notice of that evidence and were not prepared to rebut it. He objected to the prosecution introducing anything *other than* the testimony of Gray's statements to fellow inmates about the Sorrell murders. *Counsel never asked for a recess or continuance in order to marshall additional rebuttal evidence, but asked only that the factual evidence describing the crime be excluded.* (C.A.A. 2063-68). The same motion was renewed immediately before the evidence came in. (J.A. 24-28). The trial court overruled counsel's objection.

With respect to the penalty phase, the Supreme Court of Virginia found the following facts on direct appeal:

> During the penalty phase of the trial, Melvin Tucker testified that Gray told him he had "knocked off" Lisa Sorrell. According to Tucker, Gray made the statement as he pointed to a picture of Lisa Sorrell in a newspaper while searching for news articles concerning McClelland's murder.
>
> Over Gray's objection, the court permitted the Commonwealth to present additional evidence showing that the two Sorrell murders actually had occurred. The police officer who had investigated the murders testified that he found the body of Lisa Sorrell slumped in the front passenger seat of a partially burned automobile in Chesapeake, a city that shares borders with Suffolk. In the trunk of the automobile was the body of Lisa's three-year-old child, Shanta Sorrell. The officer identified various photographs of the automobile and the victims. The photographs were admitted into evidence.
>
> A State medical examiner who had performed autopsies on the bodies of Lisa and Shanta Sorrell testified about the cause of their deaths. He opined that Lisa was killed by six gunshot wounds to the head, apparently inflicted by a .32-caliber firearm, and that Shanta died of carbon monoxide inhalation. Gray, testifying in the penalty phase, denied any involvement in the Sorrell murders.

(J.A. 96-97).

Gray's implication (Pet. Br. p. 10, n.7) that the other aggravating evidence was limited to inmate testimony of Gray's other confessions is incorrect. The Commonwealth proved that Gray had a long criminal record and had been on parole from sentences for malicious wounding and attempted robbery when he murdered Richard McClelland. The victim of Gray's 1977 attempted robbery and malicious wounding testified in person. While he, his wife and two small children were bicycling, Gray, who was a perfect stranger, accosted them at gunpoint and

demanded money. When the victim refused to comply, Gray fired several shots at him, wounding him in the arm and foot, and endangering his wife and two small children who were nearby. (J.A. 14-18).

Other witnesses testified that Gray had admitted responsibility for the armed robbery of a restaurant, that he had had to leave California because he had killed a man in that state, and that he had expressed his willingness to kill a former employer for firing him for the use of profanity. Melvin Tucker also testified that Gray had expressed his intention of harming a woman in their neighborhood if she discussed the Murphy's Mart robbery.

Gray called seven "mitigation" witnesses. Gray testified in person in the penalty phase, denying any involvement in the Sorrell murders, and claiming that Tucker had been the triggerman in the McClelland murder.

The State Claim: An "Unreliable" Link

On direct appeal in the Supreme Court of Virginia, Gray never claimed that the Commonwealth had misled him about the issues to be tried in the penalty phase or had withheld exculpatory evidence from him. He complained of short notice of the additional evidence and argued that Tucker's testimony that Gray admitted committing the Sorrell murders was not sufficiently reliable to permit the introduction of the other very damaging factual evidence concerning the nature of the Sorrell murders. (C.A.A. 2742-45). The state Supreme Court rejected this argument:

> Gray was connected to the Sorrell murders by the testimony of Melvin Tucker. The jury heard and observed both Tucker and Gray and apparently chose to believe Tucker. We cannot say Tucker's testimony was incredible as a matter of law.
>
> Moreover, the evidence of the police officer and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like McClelland's, was burned after the murder. Thus the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.
>
> Gray's admission and the information about the particulars of the Sorrell murders were relevant evidence of Gray's propensity to commit violent acts in the future. We conclude, therefore, that the trial court did not err in admitting this evidence.

(J.A. 98-99). This Court denied certiorari on October 5, 1987. *Gray v. Virginia*, 484 U.S. 873 (1987).

In July, 1988, Gray filed in the Circuit Court for the City of Suffolk a petition for a writ of habeas corpus alleging 20 claims. Gray twice sought and was granted leave to add more claims. In claim IX, Gray alleged that the Sorrell murders autopsy evidence and the testimony of Detective Slezak should not have been admitted because Tucker's testimony was "inherently unreliable," and that the Commonwealth's intent to introduce this evidence was not disclosed until such a late date that it was impossible for Gray to prepare "for its use." (C.A.A. 2826). He further argued that "in fact no amount of preparation time on the part of defense counsel would have been adequate." (C.A.A. 2827). Nowhere in his state habeas petition or the two sets of amendments did Gray claim the Commonwealth had withheld exculpatory evidence or deliberately misled him about the issues to be tried in the penalty phase. The prayer for relief at the conclusion of his state petition contained only a general prayer for an evidentiary hearing "on his petition." (C.A.A. 2850).

In oral argument on the respondent's motion to dismiss the state habeas petition, Gray's habeas counsel

characterized several of his claims as not requiring additional evidence beyond that already of record:

> We have here two types of claims in my petition, Your Honor, that are there as one – one sort of claim that I would lump most of these together as legal claims. Claims based on precedent in other courts. *These are claims of law for which no evidence is necessary*. And I would certainly submit that the Court can rule on the sufficiency and legality of those claims, which are simply matters of law to be argued before the Court here today.

(J.A. 110, emphasis added). The first of the claims thus characterized pertained to the use of the allegedly perjured testimony of a Commonwealth's witness on an unrelated matter. The second claim thus characterized, however, was the complaint about admission of the Sorrell murders evidence. (J.A. 113-14).

Later in his argument, Gray's state habeas counsel suggested that evidence could be taken on this claim to show its effect on the jury, but contrasted this claim with the ineffective assistance of counsel claims which required evidence to establish the claims themselves:

> But those two grounds, [*i.e.*, the allegedly perjured testimony and the Sorrell evidence] Your Honor, I would suggest are legal claims that certainly require those – a petition for – require further evidence not only to establish the fact that they did likely have an effect on the jury. One can never determine the effect on the jury of this evidence because we could not bring the jury in to explain their effect. But we can establish the likelihood of such an effect, and for that reason, Your Honor, I would urge that those claims not be denied.

(J.A. 115-16).

> Finally, Your Honor, there is one group of claims lumped together under ineffective assistance of counsel, which in essence, the essence of it is a legal claim, but it requires evidence to be submitted to the Court.

(C.A.A. 2922).

The Circuit Court subsequently granted respondent's motion to dismiss without an evidentiary hearing. (J.A. 117). When Gray appealed that ruling to the Supreme Court of Virginia, he argued that the Circuit Court had erred in failing to give him an evidentiary hearing on his perjured testimony and ineffective assistance of counsel claims (J.A. 120-22), *but never contended the Circuit Court should have given him an evidentiary hearing on the Sorrell murders claim*. As to that claim, he argued that the Supreme Court should "re-examine" its ruling on direct appeal as it related to the admission of that evidence. (J.A. 122-24). The Supreme Court of Virginia refused Gray's petition for appeal in a final order entered July 11, 1991. In declining to revisit the claim concerning the Sorrell murders evidence, the State high court cited a State case holding that issues decided on direct appeal normally cannot be relitigated on State habeas corpus.[3] (J.A. 126). This Court again denied certiorari review on May 28, 1991. *Gray v. Thompson*, 111 S. Ct. 2250 (1991).

The Federal Claim: Advance Notice Would Have Yielded Rebuttal Evidence

In Gray's federal habeas petition, he calculatedly stated his claim concerning admission of evidence of the Sorrell murders in the penalty phase of his trial in the form of a broad recitation of allegations concerning events at his trial, with only the most general and conclusory suggestions of a legal theory upon which these events might support habeas corpus relief. (C.A.A. 32-35). The District Court initially dismissed the claim without an evidentiary hearing, holding that Gray was not entitled to advance notice of individual items of evidence the Commonwealth planned to introduce, and that any claim

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[3] *See Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970).

the Commonwealth had withheld exculpatory evidence was procedurally barred by Gray's failure to raise it in state court and was unsubstantiated by factual allegations. (C.A.A. 194). On reconsideration, the District Court discerned in Gray's recitation of the events in his penalty trial a "claim" pertaining to the Sorrell murders evidence which the Court found had been properly preserved and required an evidentiary hearing:

> On the morning the trial commenced, the Commonwealth's Attorney told Gray's counsel that he would present "statements" made by Gray to third parties that he committed the murders of a mother and daughter, Lisa and Shanta Sorrell. Immediately after the guilt phase of the trial, Gray's counsel was informed that the Commonwealth would present color photographs of the victims and detailed testimony of the autopsies and circumstances of the murders the next day, during the penalty phase, to prove that Gray had also committed the Sorrell murders.
>
> The Sorrells were murdered in December, 1984, twelve months before Gray was tried and convicted of the murder of Richard McClelland. At the time of Gray's trial, these murders remained unsolved. The only evidence that Gray committed these crimes was the testimony of Melvin Tucker, Gray's co-defendant, that after the McClelland murder, Gray also told him that he had killed the Sorrells.
>
> The next day, during the penalty phase, Tucker was permitted to recount Gray's alleged confession to the Sorrell murders for the jury. With nothing more than this to link Gray to the Crimes, the Court, as noted above, then permitted the prosecution to put before the jury every graphic detail of the Sorrell murders, even though Gray had never been charged or convicted of such crimes.

(C.A.A. 251-52).

The District Court subsequently issued an order and memorandum opinion stating that the evidentiary hearing was to address the issue of "whether the evidence presented in regard to the Sorrell murders was in fact reliable." (C.A.A. 260). At the outset of the evidentiary hearing, however, the District Court announced that the issue to be decided was not confined to the factual reliability of Melvin Tucker's testimony, but would be substantially broader, including "the notice that was given, the opportunity for cross-examination regarding the Sorrell murders issues," and "if the prosecution had exculpatory information that went in another direction and was not turned over. . . . " (C.A.A. 265). The respondent objected to the hearing because Gray had not proffered in state court the evidence in support of the claim, and it was thus defaulted both factually and legally.

Gray's evidence at the federal hearing showed that when the Commonwealth's Attorney disclosed on Monday morning that in the penalty trial, he would introduce statements that Gray had made to others that he had committed the Sorrell murders, this information did not take defense counsel by surprise. (J.A. 150-51). The previous Friday, counsel had obtained a list of the witnesses the Commonwealth had subpoenaed, and had gone to interview every witness who would talk to them. (J.A. 151). Tucker's name was on the list, and counsel were prevented from interviewing Tucker, not by any action on the part of the Commonwealth, but because Tucker's defense counsel refused to allow them to speak to his client. (J.A. 140, 151). Another name on the Commonwealth's list was that of Keith Godwin, an inmate in a local jail. Counsel attempted to interview Godwin, but he refused to speak to them, because "he hadn't cut a good enough deal with [Commonwealth's Attorney C. Phillips] Ferguson yet to testify against Gray." (J.A. 152). When counsel asked Gray the possible significance of Godwin's listing as a witness, Gray told them that "he had heard" that Godwin had told the Chesapeake police that Gray had admitted to Godwin that Gray had killed the Sorrell

victims. (J.A. 152). Gray denied to counsel that he had made such statements to either Godwin or Tucker. (J.A. 153).

When the Commonwealth's Attorney informed defense counsel on Thursday evening that he would introduce evidence describing the Sorrell murders crime scene and autopsy findings, defense counsel interviewed Detective Slezak on the phone Thursday evening. (J.A. 171).

As the Fourth Circuit correctly found (J.A. 365), the trial record shows that, at the start of the penalty trial, *defense counsel never asked the trial court for additional time to prepare to cross-examine, impeach, or rebut the factual evidence describing the Sorrell murders crime scene and the autopsy evidence of which they had just learned on Thursday evening*. The only remedy that they requested was that the evidence be excluded. (C.A.A. 2063-68; 2119, J.A. 24-28).

At the evidentiary hearing, Gray's trial counsel testified that they had no reason to question any of the evidence presented at trial describing the Sorrell murders crime scene or the findings of the autopsies, and that they had "no argument with the accuracy of it whatsoever." (J.A. 155). The only factual dispute pertained to Melvin Tucker's testimony that Gray had admitted responsibility for the Sorrell murders. (J.A. 154-55).

Gray was not sentenced to death until February 3, 1986, more than two months after the penalty phase of his trial. (J.A. 145-46; C.A.A. 2712). Trial counsel confirmed what Virginia law clearly provides: that at any time between trial and sentencing, and at any time after sentencing up to 21 days after the sentencing order had been entered, the trial court could have vacated the judgment if a motion for a new trial had demonstrated a violation of Gray's constitutional rights. (J.A. 146).

Trial counsel testified that, at the time of Gray's trial, they remembered news broadcasts saying that Timothy Sorrell had been the prime suspect in the Sorrell murders, and then that he had been eliminated as a suspect. (J.A. 139). The respondent further proved that the suspicions

about Timothy Sorrell were public knowledge before and at the time of Gray's trial by introducing numerous newspaper clippings to that effect. (C.A.A. 927-30). Nevertheless, between the penalty trial on December 6, 1985 and the time when Gray's conviction became final on February 24, 1986, defense counsel did not contact Lisa Sorrell's parents, did not ask Slezak why Timothy Sorrell had been a suspect, did not demand such information from the Commonwealth's Attorney or move the trial court to order that they be furnished with such information, and did not investigate the Sorrell murders in any way. (J.A. 147-50, 178-79). This was because defense counsel felt that Melvin Tucker's credibility, and his interest in incriminating Coleman Gray, had been fully addressed during their cross-examination of Tucker in the guilt phase of trial. (J.A. 157).

When the medical examiner essentially repeated in federal court the testimony that he had given at Gray's trial regarding the Sorrell murders, Gray did not even attempt to cross-examine him. (C.A.A. 603). Gray likewise pointed out no inaccuracies in the autopsy reports or the photographs which had been introduced in the penalty phase of his trial. Gray called Detective Slezak as a witness at the evidentiary hearing, but asked him virtually nothing about the facts related in his testimony at Gray's penalty trial describing the crime scene. Instead, Gray concentrated on exploring why Timothy Sorrell initially had been a suspect in the case. (J.A. 315-34).

Detective Slezak and the victims' mother testified at length about the Sorrell murders investigation. On December 5, 1984, Lisa and Shanta Sorrell were last seen leaving the home of Lisa's mother, Brenda Nixon, between 4:30 and 4:45 p.m. to go to Greenbriar Mall, a scant two miles away. From there they planned to go home. Mrs. Nixon expected that her daughter and granddaughter would reach their own home between 5:30 and 5:45, and tried to call her daughter at home at that time. Because no one answered, she called every ten minutes

until 8:00 that evening, becoming increasingly alarmed. (J.A. 285-86).

At about 6:30 p.m., Timothy Sorrell called his mother-in-law to ask if she had heard from Lisa. (J.A. 286). He called again to inquire at 7:30 and again about 10:30. (J.A. 287). Although Mrs. Nixon thought Timothy Sorrell attended evening class at the community college on Wednesday nights, including December 5, Sorrell did not tell her that he was calling from the community college, and she did not ask him. (J.A. 291-92). Police investigation of Timothy's whereabouts revealed that he had been at his mother's house prior to 5:00 (J.A. 323), that he had given a friend a ride to the technical center that was part of Tidewater Community College that evening (J.A. 322-24), and that he had spent the next several hours of the evening at the home of a female friend named Deborah Robertson. (*Id.*) The information that Timothy had been at his mother's house in the late afternoon was provided by Mr. and Mrs. Nixon (J.A. 323); Timothy's alibi at the Robertson house was corroborated by Deborah Robertson. (J.A. 187, 322-23). At the time Ms. Robertson told the police this information, her husband or boyfriend was present, and seemed aware that Timothy had been at the Robertson home on the evening of December 5. The police did not detect any uneasiness between the couple, and concluded that there was no reason to suspect an illicit relationship between Timothy and Deborah Robertson, or to doubt Ms. Robertson's word. (J.A. 322-23). Detective Slezak testified that, although he remembered Timothy telling him that he had been to Chesapeake Technical School to drop off a friend (J.A. 187, 322, 324), he did not recall Timothy ever telling him that he had stayed at evening class throughout the period when the murders apparently were committed. (J.A. 188).

At about 10:30 p.m., roughly 15 minutes after Timothy's last phone call to the Nixons, he came to their home crying. Mrs. Nixon noticed that his pants were wet, but did not think this unusual because it was raining outside.

(J.A. 288). Timothy suggested that they go to Greenbriar Mall to look for Lisa and Shanta. He left in his own car to do so, and Mr. Nixon left immediately thereafter in the Nixon car. (J.A. 288). When Sorrell passed Nixon at Greenbriar Mall while both were looking for Lisa and Shanta, he seemed to ignore Nixon. (J.A. 199). Nixon and Sorrell returned to the Nixon home about 15 minutes later (J.A. 289), and Timothy and Mr. and Mrs. Nixon went to the home of Timothy and Lisa Sorrell, where they all stayed throughout the rest of the night and the next day. (J.A. 289-90).

The bodies of Lisa and Shanta Sorrell were found five days later, on December 10, 1984, in Lisa's four-door burgundy Honda automobile. The car was located approximately five miles from Greenbriar Mall. (J.A. 29, 315). The insides of the windows were covered with soot, obscuring vision into the car. (J.A. 29, 315). Inside the car, a fire had been set to a small pile of paper and debris on the front floorboards. No accelerants had been used in setting the fire. The sun visors melted down from the heat, and the inside of the driver's door was charred. There was soot throughout the interior of the car. (J.A. 315). Lisa Sorrell was sitting in the front passenger seat, and Shanta Sorrell's body was in the trunk. (J.A. 30, 316). Some of Lisa Sorrell's jewelry was still on her person, but there was only a small amount of money in her purse. (J.A. 316-17). The police were unable to determine how much money she had had when she left the Nixon residence, but she was going shopping and intended to have her daughter's picture taken with Santa Claus at Greenbriar Mall. (J.A. 318-19).

Lisa Sorrell had died of six gunshot wounds from a .32 caliber weapon, closely placed above and behind her right ear. (J.A. 44). Shanta Sorrell had died of smoke inhalation. Because soot was found in her airways, the medical examiner opined that the smoke had come from a smoldering fire, not from the exhaust of the automobile. (J.A. 42).

The Chesapeake police began to suspect Timothy Sorreli was involved with the murders on the night the bodies were found. This was because of the reactions of Sorrell and his mother when the police went to tell him of their discovery. Sorrell's mother greeted Detectives Slezak and Harrison at the door of Timothy's home. When the detectives identified themselves, she immediately told Timothy that he did not have to tell them anything. Also, after the detectives had told Timothy about finding the bodies, and asked him if he had any questions, Sorrell asked them questions which they considered odd: he asked them if they had used a helicopter to look for the vehicle, and why the police were so late in notifying him that the bodies had been found. These remarks, plus Sorrell's general demeanor, made the police suspicious. They kept him under surveillance for several days, but learned nothing of value from the surveillance. (J.A. 185-87). As previously stated, the police investigated Timothy Sorrell's whereabouts on December 5, and corroborated what he had told them. (J.A. 187-88, 322-24).

The police were aware that Mr. and Mrs. Nixon had purchased a $50,000 life insurance policy on both Lisa and Timothy. Timothy was the named beneficiary in the event of Lisa's death. (J.A. 188, 284). They investigated other possible motives that Timothy might have had, and learned that his brother had been arrested on a drug charge, but found no connection between that and Timothy or the Sorrell murders. (J.A. 189-90). Because Timothy Sorrell was initially a suspect in the case, his name was listed on requests the police sent to the state lab and reports back from the lab throughout the investigation. (C.A.A. 730-48). This was done as an administrative measure to identify the case with respect to which the lab work was done; it continued even in July 1985, after Timothy Sorrell had been eliminated as a suspect. (J.A. 263).

From checks found on Lisa Sorrell's body, the police learned that she had been selling to people in the community various items of merchandise that corresponded to

merchandise sold in the Naval Supply Center where Timothy Sorrell worked. The police investigated whether Timothy was stealing merchandise from his employer and his wife was selling it, but the Naval authorities never could confirm that such merchandise had been stolen from the Naval Supply Center. (J.A. 263-65). Mrs. Nixon also suspected that Timothy was involved with stolen goods from the Navy Exchange. (J.A. 312-13). She mentioned one occasion when her daughter had called her voicing concern about a man with whom Timothy worked who was at the house "with some things." Mrs. Nixon suggested she have Timothy tell the man to remove them from their house. There was no evidence that Timothy ever knew that Lisa had made this telephone call to her mother. (J.A. 313-14).

The police shared information with the Nixons (J.A. 196-97), and within a month after the murders, the Nixons suspected that Timothy Sorrell knew what had happened to his wife and daughter. However, Mrs. Nixon testified repeatedly that she never believed that Timothy himself had murdered them. (J.A. 298, 303, 308). They began to think back to his actions when the victims disappeared and shortly thereafter. They thought it suspicious that Timothy had been crying when he came to their home at 10:30 that night. (J.A. 309). They also thought his actions before the bodies were found were peculiar, and were suspicious about his statements in a television appeal for information about the missing persons wherein he implored whoever might have them not to hurt them. (J.A. 308-09). Two years later, they filed a lawsuit to prohibit Timothy from collecting the insurance proceeds. At that time, in a thought process which Mrs. Nixon described as "grasping for straws," (J.A. 295), she suspected that Timothy Sorrell's pants had been wet on December 5, not because it was raining outside, but because he had walked through tall wet grass at the crime scene. (J.A. 295). There was never any evidence that there were burrs, grass seeds, or other debris on Sorrell's trousers. She also thought it suspicious that Timothy

seemed not to want to be alone during the time between Lisa's disappearance and when the bodies were found. (J.A. 309).

During the investigation, a $10,000 reward offered by a church and a radio station was advertised in the local newspapers. (J.A. 214, 280). In June 1985, after the reward had been advertised in the newspaper, two individuals named Michelle Davis and Ronald Cole gave the Chesapeake police a report that was superficially incriminating to Timothy Sorrell. (J.A.214-15, 235-36). The police thoroughly investigated this report, however, and determined that it was transparently false.

One of the incidents which Cole and Davis reported concerning Timothy Sorrell had supposedly occurred at a party which they attended at Sorrell's home. They claimed that, during the party, Timothy had discussed plans to kill his wife. (J.A. 215-16). Although the house was in their own neighborhood and they thus should not have had any difficulty in maintaining their bearings in the vicinity, they could not correctly lead the police to Timothy Sorrell's home, selecting instead a home located in an entirely different setting in the subdivision. (J.A. 217-18, 245-46). Although they had reported seeing the car which Lisa Sorrell drove on one occasion shortly before her death, they could not accurately describe her car. (J.A. 216-17). They claimed Timothy said his wife had been shot six times in the forehead, whereas she really had been shot six times in the right rear of her head. (J.A. 257-58). They claimed that they had seen Timothy Sorrell at the Greenbriar Mall on the afternoon Lisa and Shanta Sorrell disappeared, and that he had told them that he had just shot at Lisa's car. The murders were actually committed, and the automobile located, five miles distant from Greenbriar Mall. (J.A. 29, 219-20). Although Cole and Davis described this incident as having occurred in the early afternoon of December 5, 1984 (J.A. 218-19), Lisa Sorrell had last been seen alive by her parents at 4:30 p.m. on that date. (J.A. 219, 278). Another individual whom Cole and Davis had identified as being present at a party

where they claimed Timothy Sorrell had discussed plans to kill his wife said he was in fact present at such a party in December 1984 in that neighborhood, but that Timothy and Lisa Sorrell had not been present. (J.A. 220-21). Moreover, a few days after Cole and Davis originally had made these reports to the Chesapeake police, they came in and admitted to the police that their reports were false. (J.A. 220, 243-45).

Coleman Gray first became a suspect in the Sorrell murders investigation when, in late June 1985, Detective Slezak saw Suffolk Police Department photographs and information from the McClelland investigation showing how Gray had burned the interior of the victim's automobile, and had shot the victim six times in the back of the head with a .32 caliber handgun. (J.A. 205). As the Supreme Court of Virginia found on direct appeal, (J.A. 98), and as defense counsel recognized, (J.A. 141), the crimes were committed in a strikingly similar manner.

Even to the extent the crimes differed, the differences could be attributed to the increasing sophistication of the killer. Slezak testified, and the record reflects, that in the McClelland murder, committed some five months after the Sorrell murders, gasoline was used as an accelerant in burning the interior of the car. (J.A. 223). Also, while in the Sorrell murders, the killer had spray-painted the exterior handles of the car, apparently to cover his fingerprints, no such precautions had been necessary in order to cover fingerprints in the McClelland murder, apparently because the killer wore gloves. (J.A. 223-24). Detective Slezak, with 22 years experience as a police officer, testified that it was not unusual for a serial killer to develop expertise and improve his methods of committing crimes and avoiding detection as he committed subsequent murders. (J.A. 225).

Both the McClelland murder and the Sorrell murders were committed with .32 caliber handguns. (C.A.A. 599, 746, 1545). The Commonwealth had introduced evidence in the guilt phase of Gray's trial that the McClelland murder was committed with a handgun which had been

stolen by Gray in March, 1985 (C.A.A. 1885-86), so there was no contention that both crimes had been committed with the same handgun. Nevertheless, Slezak testified to various reasons why a serial killer might repeatedly choose to use a .32 caliber handgun if his *modus operandi* were to rob his victims and then shoot them in the head at very close range. (J.A. 325-28).

Also in June of 1985, Detective Slezak obtained from Suffolk Police Detective Bunker a copy of a statement given to Bunker by an inmate named Keith Godwin. (J.A. 226-27). Godwin had been a cellmate of Gray for a brief period of time, and told Bunker about Gray's admissions to him that he had committed both the McClelland murder and the Sorrell murders. (J.A. 227).[4] Godwin did not testify against Gray at trial, because he was unable to negotiate the sort of benefit that he wanted in exchange for his testimony. (J.A. 152).

Because of the obvious, strong similarities which Detective Slezak noticed between the McClelland murder and the Sorrell murders, the statement of Keith Godwin influenced him to investigate Gray's possible connection with the Sorrell murders. (J.A. 226-27). At that point, the police had no hard evidence that Timothy Sorrell was involved in the Sorrell murders. (J.A. 229). Slezak went to visit Gray in jail, falsely told him that they were planning to prosecute Timothy Sorrell for the Sorrell murders, and that, because of the similarities between the Sorrell crimes and the McClelland murder, they needed to be able to prove that Gray was not involved in the Sorrell murders in order successfully to prosecute Timothy Sorrell. This was not true (J.A. 229), but was said in an effort to put Gray at ease and induce him to give the police

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[4] Godwin's entire statement was received in evidence at the federal evidentiary hearing. (C.A.A. 897-905). The respondent produced evidence strongly corroborating that Gray had made the statement to Godwin, although Gray may not have been truthful in implicating his wife in the crimes.

information about the Sorrell murders that might incriminate him. Gray eagerly cooperated in what he thought was an opportunity to steer the police away from any suspicion that he had committed the Sorrell murders. (J.A. 230).

Although the police had obtained no identifiable fingerprints from the Sorrell automobile, Slezak told Gray that they had, and got samples of Gray's fingerprints. Slezak gave these samples to another detective and arranged for him to interrupt Slezak's interview with Gray in 20 or 30 minutes and tell him that the fingerprint technician urgently wanted to speak with Slezak. When the detective did so, Slezak pretended to be irritated with the interruption, apologized to Gray, and left the office for 15 minutes or so. When he came back in, he falsely told Gray that out of 18 partial fingerprints found in the Sorrell automobile, they had matched one of Gray's fingerprints. (J.A. 230). In previous questioning, Slezak had established that there was no innocent way Gray's fingerprints could be in the Sorrell car. (J.A. 231). Gray continued to deny his involvement with the crimes. When Gray left Slezak's office at the end of that interview, Slezak and Gray were the only two people who were aware of the fiction that Slezak had told Gray about matching one of 18 partial fingerprints. (J.A. 231).

Subsequently, Slezak learned from the Chesapeake Commonwealth's Attorney that an inmate named Larabee Farrell had written to the Commonwealth's Attorney saying that he had overheard Gray telling another inmate that Gray had committed the Sorrell murders. When Slezak interviewed Farrell, Farrell told him that Gray had told the other inmate "that the police department had 18 partial fingerprints that were found in the car, and only one of them matched him; that he wasn't worried about it." (J.A. 233). Farrell quoted himself as replying, "You dumb ass, how many do you think they need?" He said that Gray then responded, "I guess I touched the owner's manual when I went through the glove box." (J.A. 233). Slezak had not told Farrell the

fiction he had told Gray about the 18 prints with one matching, and the only other person Farrell could have heard that from was Gray. (J.A. 233).

At that time, at the time of Gray's trial, and at the time of the federal evidentiary hearing, Slezak remained convinced that Gray had committed the Sorrell murders. He testified in the federal hearing that it was possible that Timothy Sorrell had been involved in some way, perhaps hiring Gray to commit the Sorrell murders, but he had no evidence to that effect. Nor did he have any viable leads that could be investigated with a prospect of discovering hard evidence to connect Timothy Sorrell or anyone else with the Sorrell murders. (J.A. 233-34).

Suffolk Commonwealth's Attorney C. Phillips Ferguson testified that, although Melvin Tucker as well as Gray initially may have been charged with capital murder, Tucker was never in danger of being convicted of capital murder or sentenced to death, regardless of whether he testified against Gray. (C.A.A. 508-10). Gray, rather than Tucker, was prosecuted for capital murder because all the evidence showed that Gray was the trigger man. (C.A.A. 505). This evidence was summarized not only by Ferguson's testimony (C.A.A. 506-08), but by the factual findings of the Supreme Court of Virginia on direct appeal. (J.A. 95).

In its final order granting habeas corpus relief, the District Court concluded that "the constitutional defect in Gray's penalty phase hearing" was "that the petitioner was confronted and surprised by the testimony of Officer Slezak and Dr. Presswalla," and that this surprise "violated Gray's right to fair notice and rendered the hearing clearly unreliable." (J.A. 349).

The Fourth Circuit reversed. Citing *Caspari v. Bohlen*, 114 S. Ct. 948 (1994), and *Saffle v. Parks*, 494 U.S. 484 (1990), the Court held that the rule sought by petitioner, "a constitutional entitlement to *adequate advance* notice of *particular* items of evidence" "would be novel even today and certainly was not compelled by existing precedent at the time [Gray's] conviction became final." (J.A. 364,

emphasis in original). The Court of Appeals also concluded that "petitioner's contention rings hollow on its facts" because petitioner did not even purport to challenge the accuracy or reliability of the factual evidence with which he claims he had been surprised, and he demonstrated no meaningful way in which he would have proceeded differently had this evidence been disclosed in advance. (J.A. 369). Judge Hall's concurring opinion noted that he would have held the Sorrell murders claim procedurally barred because Gray had never proffered in state court any of the supporting evidence which he presented in the District Court. (J.A. 374-75).

SUMMARY OF ARGUMENT

I.

Calculating that a moving target will be more difficult for the Respondent to hit, Petitioner now attempts to present to this Court his *third* theory of how the use of the "Sorrell murders" evidence violated his constitutional rights. In the State courts, he contended that the autopsy and crime scene evidence should have been inadmissible as a matter of law because the crime was unadjudicated and Melvin Tucker's testimony was too unreliable to link Gray to the murders. In the lower Federal courts and in his Petition for Certiorari in this Court, he embellished upon that theory by adding a complaint that, had he known in advance that the Sorrell murders crime scene and autopsy evidence would be used, he would have been able to discover and present information tending to show that the Sorrell murders were committed by Timothy Sorrell rather than Gray. Now, in his brief on the merits, Gray contends for the first time that the prosecutor misled him as to the *issues* to be litigated in his penalty trial, leading him to think that the "issue" would be the credibility of inmate testimony, whereas the real "issue" would be evidence of *modus operandi*, or similarity of crimes.

Even if the rules of comity, procedural default, and orderly federal procedure were to be suspended in this case and Gray were allowed continually to move the target in this manner, it would not be difficult to score a bullseye each time. Gray's present theory is absurd, because Gray certainly was no *less* inclined, after the prosecutor's partial disclosure, to prepare a defense concerning the Sorrell murders than if the prosecutor had told him *nothing* about his plans to link Gray to the Sorrell murders. In addition, the prosecutor's notice was, at worst, late, and may have been remedied by a recess or continuance to allow Gray to marshall rebuttal evidence. Gray, however, did not ask for a recess or continuance. The only remedy he sought was exclusion of this evidence, and the Constitution certainly does not require such an inflexible response to late notice.

Gray's argument in the lower Federal courts and in his Certiorari Petition must be rejected because there clearly is no constitutional right to advance notice of individual items of evidence which the prosecution will offer, and because, for all of his hyperbole and distortion, Gray has not produced any admissible, material evidence tending to show that he did not commit the Sorrell murders and would not be a future danger.

Gray's argument in the State courts was unsound because the credibility of Tucker's testimony was a matter within the exclusive province of the jury, and the crime scene and autopsy evidence was relevant to show the similarity of the Sorrell murders to the McClelland murder for which he had been convicted, and to show the nature of the Sorrell murders for the purpose of proving Gray's future dangerousness.

Thus, even if the rules of comity, procedural default, and orderly federal procedure were to be suspended for this case and the Respondent were to be required, in this forum, to answer any argument Petitioner could today imagine, each of his various theories would require the Federal courts impermissibly to announce a new rule of law in habeas corpus review of a State judgment, and

each of his theories would be without merit on first principles.

The rules, of course, should not be suspended. Gray's claim as presented in the lower Federal courts should be ruled procedurally barred because it was not exhausted in State court and would presently be barred there for independent State procedural grounds. His theory presented in his brief on the merits in this Court should be rejected for the same reason, and also because it was neither pressed nor passed upon in the lower Federal courts.

II.

Gray's claim that the prosecution withheld exculpatory evidence concerning the Sorrell murders should be rejected because it is without merit, and because it is procedurally barred. It is without merit because the vast majority of the "information" which Gray and the District Court mistook for exculpatory evidence is, like the polygraph examination report recently reviewed by this Court in *Wood v. Bartholomew*, "not 'evidence' at all." 116 S. Ct. 7, 10 (1995). The few shreds of this "information" which may have been admissible under State law were either immaterial or of equal access to Gray and therefore not constitutionally required to be disclosed by the prosecution.

The exculpatory evidence claim is procedurally barred because, as the District Court found, it was never exhausted in State court and would currently be deemed procedurally barred from State habeas review. In addition, the District Court's denial of relief on this as a free-standing claim was never appealed by Gray to the Fourth Circuit, and thus is not properly before this Court.

ARGUMENT

I. GRAY'S "SORRELL MURDERS" CLAIM WOULD REQUIRE THE ADOPTION OF AN IMPERMISSIBLE NEW RULE, IS WITHOUT MERIT, AND IS PROCEDURALLY BARRED.

A. Gray's Claim Would Require The Adoption Of A New Rule.

Distilled to its essence, the rule advocated by Gray is that the Constitution requires nothing short of the exclusion of evidence when, at a capital sentencing proceeding, the prosecutor first tells the defense he intends to prove the defendant's guilt of another murder by proof A and then later says he is going to use proofs B and C as well. Whether this contention is founded on a theory that the prosecution has a constitutional duty to disclose its proofs in advance, or a theory that such conduct by the prosecutor misleads the defendant as to the issues to be litigated,[5] the rule would be new even today. It thus

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[5] While Gray now claims the prosecutor surprised him with new *modus operandi* evidence linking him to the Sorrell murders, the "claim" on which the District Court heard evidence, which was quoted verbatim from Gray's Federal Habeas Petition, expressly stated that *"The only evidence* that Gray committed [The Sorrell Murders] was the testimony of Melvin Tucker," and that the trial court permitted the crime scene evidence *"with nothing more than this* to link Gray to the crimes. . . . " (R. 251-52, emphasis added). Even in his Petition for Certiorari, Gray stated that the "very essence" of his case was that "the prosecutor's tactics of secrecy and surprise" deprived him of a fair opportunity to challenge the accuracy or materiality of the Sorrell murders evidence. (Cert. Pet. p. 24). While he also complained of "the prosecutor's deceitful tactics," this complaint referred to an allegedly dishonest response to his *Brady* motion. Stated differently, his argument was that he was not "given adequate notice or, at the very least, an honest response to [his] *Brady* motion. . . . " (Cert. Pet. p. 23). His complaint about *modus operandi* evidence, while it has no more

cannot be announced in federal habeas review of a state criminal judgment. *Caspari v. Bohlen*, 114 S. Ct. 948 (1994); *Teague v. Lane*, 489 U.S. 288 (1989).

Gray asks this Court to conceptualize the applicable rule at the broadest possible level, arguing that invalidation of his death sentence is dictated by the principle that due process of law applies in sentencing proceedings, *Gardner v. Florida*, 430 U.S. 349, 358 (1977), the principle that a heightened standard of reliability is required in capital sentencing proceedings, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), the principle that a defendant is entitled to fair notice of the charges against him, *In Re Gault*, 387 U.S. 1 (1967), and the principle that a defendant may not be sentenced on the basis of information which he has had no opportunity to deny or explain. *Gardner*, 430 U.S. at 362. His analysis is flawed for at least two reasons.

First, the level of generality at which he seeks to apply the "new rule" doctrine would render it meaningless: it would reduce this Court's "new rule" jurisprudence to a doctrine no more restrictive than simple *stare decisis*. *See Gilmore v. Taylor*, 113 S. Ct. 2112, 2119 (1993); *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).[6]

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validity than his previous claim, thus "change[s] the substance of the questions already presented," U.S.S. Ct.R. 24.1(a), and should be rejected for that reason. *See Izumi v. U.S. Phillips Corporation*, 114 S. Ct. 425 (1993); *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Tison v. Arizona*, 481 U.S. 137, 146 n.2 (1987); *American National Bank v. Haroco, Inc.*, 473 U.S. 608 (1985).

[6] This case does not involve the sort of rule which "of necessity requires a case-by-case examination of the evidence," and "can tolerate a number of specific applications without saying that these applications themselves create a new rule." *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring). Such rules are those designed to provide a scale upon which lower courts are to weigh the evidence. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984) (standard for determining ineffective assistance of counsel); *Jackson v. Virginia*, 443 U.S. 307

Second, none of the broad pre-existing constitutional principles which Gray invokes would invalidate the death sentence in his case. The truism that due process applies in sentencing proceedings begs the question of what process is due. The requirement of heightened reliability in capital sentencing proceedings is an underpinning of *all* of this Court's capital sentencing case law. *Sawyer*, 497 U.S. at 243. If that were the level of generality at which the "new rule" doctrine should be applied, *no* federal habeas corpus decision with respect to the requirements of capital sentencing proceedings could *ever* be a new rule. *See Sawyer*, 497 U.S. at 243.

Gray's constitutional entitlements to notice of the charges and the opportunity to deny and explain the information upon which his sentence was to be based were honored by the state court in his case. Gray undeniably had notice of the nature of the capital murder with which he was charged, and had notice that the Commonwealth would seek the death penalty on the dual bases of Virginia's "future dangerousness" and "vileness" aggravating factors. These were the *issues* to be litigated in Gray's case.[7] Gray had even more specific notice than

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(1979) (standard for evaluating sufficiency of evidence to support conviction). The sort of rule involved here is one controlling the manner in which proceedings are conducted. A factual distinction in such cases is much more likely to change the force with which an established principle applies, *see Wright*, 505 U.S. at 304 (O'Connor, J. concurring), and the rule generally cannot be separated from the result. *See Teague*, 489 U.S. at 301 (defining a "new rule" in terms of the "*result*").

[7] In complaining that the prosecutor's remarks indicated that their evidence would consist of inmate testimony, whereas their evidence turned out to include proof of a *modus operandi*, Gray is addressing notice of the *type of evidence* to be used rather than notice of the issues to be litigated. This is a claim of a right to know how the Commonwealth will prove its case, *i.e.*, a claim of a constitutional right to discovery. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (no constitutional right to discovery).

that, however. He had notice that the Commonwealth would introduce evidence in the penalty phase indicating that he had committed the Sorrell murders. In addition, Gray had the opportunity to deny or explain this evidence, and he in fact did take the witness stand in person and denied having made the inculpatory statement attributed to him by Tucker. (C.A.A. 2219).

Any putative "rule" which the state court supposedly violated, then, must necessarily be drawn more narrowly than the broad principles upon which Gray relies. Indeed, the District Court stated that the "constitutional defect" Gray had proven was lack of notice of *individual items of evidence*:

> The constitutional defect in Gray's penalty phase hearing – that the petitioner *was confronted and surprised by the testimony of Officer Slezak and Dr. Presswalla* – violated Gray's right to fair notice and rendered the hearing clearly unreliable.

(J.A. 349, emphasis added).

Gray denies that he is advocating a constitutional requirement of advance notice of individual items of evidence, and argues that his rule is simply that, if a prosecutor does give such notice, it cannot be misleadingly incomplete. If the rule were only this, however, and did not include an affirmative duty on the part of the prosecution to disclose its evidence in advance, it would not even apply in Gray's case because, whatever one says of the prosecutor's conduct, it certainly rendered Gray no worse off than if the prosecutor had told him *nothing* in advance about his intentions to link Gray to the Sorrell murders.

Gray faults the prosecutor's piecemeal disclosure of his evidence because Gray supposedly would have prepared a more thorough defense if he had known before trial *all* the evidence that the prosecutor planned to present. The fallacy in this argument is that it assumes a constitutional duty on the part of the prosecutor to disclose his evidence in advance. If Gray concedes that no

such duty exists, then the relevant frame of reference in determining whether Gray was misled in any constitutionally prejudicial sense by the prosecutor's piecemeal disclosure is to compare his plight after the piecemeal disclosure to what it would have been had the prosecutor disclosed *nothing* about his plans to link Gray to the Sorrell murders. Having received the prosecutor's pretrial notice that he would introduce Tucker's testimony, Gray was certainly no *less* likely and no *less* inclined to prepare rebuttal evidence concerning the Sorrell murders than if he had been told *nothing*. *Gray thus must inevitably depend on a putative constitutional duty to disclose in advance individual items of evidence.*

Gray's theory, and the District Court's opinion, relied primarily on the rule announced in *Gardner v. Florida* that a defendant may not constitutionally be sentenced on the basis of information which he has had no opportunity to deny or explain. *Gardner*, however, involved a defendant who was sentenced on the basis of a presentence report which contained information which *was never revealed to the defendant at sentencing or at any time until the case was briefed in this Court*. 430 U.S. at 354, 355, n.5. No such secret evidence was presented to the sentencer in Gray's case; all of the evidence of which he complains was presented in open court and was fully subject to cross-examination, and Gray in fact did testify and deny that he had told Melvin Tucker that he had committed the Sorrell murders. As the Fourth Circuit noted, if Gray had felt that more time was necessary to marshall evidence to rebut Tucker's testimony, he could have asked for a recess or continuance. The record clearly shows, however, that Gray chose not to ask for a recess or continuance. The only remedy he requested was that the evidence be excluded. (C.A.A. 2063-68, J.A. 24-28).

Gray thus seeks to extend the *Gardner* rule to cases where the information upon which sentence is to be based is disclosed in open court during the sentencing proceeding. As both the District Court (J.A. 350) and the Court of Appeals recognized, to apply the *Gardner* rule in

this case "requires the analytical equation of 'secrecy' and 'surprise.' " (J.A. 367). The District Court ignored this Court's "new rule" jurisprudence altogether in making this analytical equation; the Court of Appeals correctly ruled that such an equation was impermissible under *Teague* and its progeny.

The analytical equation of "secrecy" and "surprise" in this context would require the Court to extend the language of the *Gardner* rule beyond its literal meaning: a defendant's constitutional right to "deny or explain" the information upon which his sentence is to be based would be interpreted as including a requirement that he have the information disclosed to him in advance so that he may prepare an entire case of rebuttal. In order to determine whether such an extension is permissible under *Teague*, the Court must ask, not whether *Gardner* reasonably can be interpreted as requiring this result, but whether at the time Gray's case became final, *Gardner* reasonably could be interpreted as *not* requiring as much. *Graham v. Collins*, 506 U.S. 461, 477 (1993). Even today, *Gardner* reasonably can be interpreted as not commanding advance disclosure of individual items of evidence.

The *Gardner* plurality opinion itself undercuts the extravagant gloss placed on it by Gray and the District Court. After concluding that due process applied in the sentencing in criminal cases, the *Gardner* plurality was quick to point out that its conclusion "does not, of course, implicate the entire panoply of criminal trial procedural rights." 430 U.S. at 358, n.9.[8] Gray, however, would read

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[8] While one lower court, in a pre-*Teague* ruling, found that the *Gardner* condemnation of secret evidence was, by extension, applicable against surprise evidence, *see Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), other courts quite reasonably reached a contrary conclusion. *See Profitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir. 1983); *United States v. Fatico*, 579 F.2d 707, 711-12, n.10 (2d Cir. 1978).

Gardner as conferring upon a criminal defendant new and greater procedural rights in sentencing than defendants currently enjoy even at the trial on guilt or innocence. As the Court of Appeals correctly observed, even in federal criminal cases, there is no right to advance notice of witness statements or corroborating evidence. (J.A. 366).

This Court's "new rule" decisions repeatedly have held that a constitutional rule that a state may not *prevent* a given occurrence in criminal proceedings does not dictate a conclusion that the state may not constitutionally *limit* or *control* the manner in which the event occurs.[9] Similarly, other decisions of this Court have held that rules requiring that state procedures ensure the presence of various safeguards do not dictate conclusions that the States must adopt specific *means* of providing such assurances.[10]

This Court found it unnecessary in *Estelle v. Smith* to decide the advance notice issue. 451 U.S. 454, 473 n. 17 (1981).

[9] For example, in *Saffle v. Parks*, 494 U.S. 484 (1990), this Court held that the constitutional rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), that, in capital sentencing proceedings, the state may not preclude the jury from considering as mitigation any evidence which the defendant offers for that purpose did not dictate a conclusion that the state could not *limit* or *control* the manner in which the jury considered such evidence by refusing to give a jury instruction permitting the jury to choose a life sentence over a death sentence based on sympathy engendered from the defendant's mitigating evidence. 494 U.S. at 492-93. In *Graham*, this Court followed essentially the same analysis in holding that the *Lockett* rule did not dictate the conclusion that a state may not channel a jury's consideration of a defendant's evidence of his solid upbringing and good character into its resolution of one of the Texas "special issues," relating to future dangerousness. 506 U.S. at 475, 113 S. Ct. at 901-02.

[10] For example, in *Teague* itself, this Court held that constitutional rules guaranteeing that trial juries be fairly selected without the influence of racial bias did not dictate a conclusion that fair selection must be assured by proportional

Under the same logic, *Gardner's* command that States ensure the reliability of sentencing evidence by subjecting it to the adversary process and allowing the defendant to deny or explain it certainly does not dictate that States provide this assurance by the *specific means* of advance disclosure to the defense of the evidence the State intends to use at sentencing so that rebuttal evidence may be marshalled before the hearing, as opposed to requiring the defense to respond with the evidence it has at hand or ask for a recess or continuance to marshall additional evidence.

Indeed, this Court's pre-*Teague* case law supports essentially the same conclusion even as a matter of simple *stare decisis*: a constitutional guarantee of a procedural safeguard does not necessarily *support*, much less *dictate*, the conclusion that the Constitution guarantees a specific measure which would be helpful in effectuating that safeguard.

Most pertinent and cogent are the cases applying the Sixth Amendment rights of confrontation and cross-examination of adverse witnesses at trial, and of compulsory process to obtain defense evidence. Although advance notice of the details of witnesses' testimony and of individual items of prosecution evidence undoubtedly

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representation of races on a petit jury. 489 U.S. at 301. In *Sawyer*, this Court held that the constitutional guarantee of reliability in fact-finding in capital sentencing proceedings established in *Woodson* and *Gardner* did not dictate the conclusion that such reliability must be assured by specific means, in that case by applying the rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), prohibiting prosecutors from misleading juries to believe that the responsibility for capital sentencing rested elsewhere. 497 U.S. at 236. In *Gilmore*, this Court held that prior cases guaranteeing a defendant the opportunity to present his defense did not dictate a conclusion that the Constitution requires States to ensure that jury instructions outlining affirmative defenses must be stated with a requisite degree of clarity. 113 S. Ct. at 2118-19.

would be helpful in making cross-examination more effective, this Court clearly has held that the constitutional right does not extend that far. There is no constitutional right to receive copies of the pretrial statements of prosecution witnesses even after their testimony on direct examination, *United States v. Augenblick*, 393 U.S. 348, 356 (1969), and there is no constitutional right to discovery in general. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). This is so even though the right of confrontation and the right to compulsory process for obtaining defense witnesses were deemed by the founding fathers to be so central to our system of ordered liberty that they were spelled out expressly in the Sixth Amendment. If the requirement of advance notice of evidence even at the trial on guilt or innocence does not flow from the rights of confrontation, cross-examination, and compulsory process as a matter of *stare decisis*, then surely advance notice of evidence in a penalty proceeding is not *dictated* by the guarantee of an opportunity to explain or contradict such evidence.[11]

In consideration of all the foregoing case law, it certainly would be eminently reasonable, even today as well as in 1987 when Gray's conviction became final, for a trial court to conclude that neither *Gardner* nor any other of this Court's decisions forbade the introduction of penalty phase evidence simply because it had not been disclosed to the defense in advance of the hearing. Granting relief

[11] Additional examples are easy to cite. The right to the assistance of counsel does not include a constitutional right to specific measures that would be helpful to counsel in representing a defendant's interests. *See Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The constitutional right to assurance of an impartial jury has been held not to guarantee the right to ask "content" questions in voir dire that would be helpful in the selection of such a jury. *Mu'Min v. Virginia*, 500 U.S. 415 (1991). The constitutional obligation of trial courts in voir dire to "cover the subject" of pretrial publicity has been held not to require them to do so in a particular manner. *Id.*, 500 U.S. at 424-25.

on Gray's claim thus would require a federal habeas court impermissibly to apply the *Gardner* rule "in a manner that was not dictated by precedent." *Stringer v. Black*, 503 U.S. 222, 228 (1992).

Even if Gray were in a position to complain that the prosecutor's disclosure was misleadingly incomplete, such a rule would be new even today. The established rule is that alleged prosecutorial misconduct does not amount to a constitutional violation unless it "so infects the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). That principle, however, even when combined with Eighth Amendment requirements of reliability in sentencing, does not dictate a conclusion that a specific unfair tactic of the prosecutor which does not itself meet the *Donnelly* standard constitutes an Eighth or Fourteenth Amendment violation. For example, the rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a prosecutor's misleading argument to the jury minimizing their sense of responsibility for the sentencing decision posed an unacceptable risk of arbitrary or capricious sentencing, was a new rule for *Teague* purposes. *Sawyer*, 497 U.S. at 236. It is no accident that Gray fails to cite *Caldwell*: citation of *Caldwell* would lead one to *Sawyer*, and *Sawyer* demonstrates that Gray's rule is "new," as was the rule in *Caldwell*.

In addition, the prosecutor's disclosure of his intention to introduce the factual evidence describing the nature of the Sorrell murders was, at worst, late. Although a customary alternative remedy for late disclosure is a recess or a continuance to enable the surprised party to marshall rebutting evidence, *see Taylor v. Illinois*, 484 U.S. 400, 413 (1988), Gray asked for no such relief. The only remedy he sought is that the evidence be excluded. To hold that the Constitution requires exclusion under these circumstances, without the defendant ever having asked for a recess or continuance in the alternative, would certainly be a new rule. *See Taylor*, 484 U.S. at 414 ("neither necessary nor appropriate" for this Court

"to attempt to draft comprehensive set of standards to guide the exercise of discretion in every possible case" of discovery violation).

Gray also argues that the District Court's new rule falls within the second exception to the *Teague* doctrine, which allows federal courts on habeas review of state criminal judgments to announce " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495, *quoting Teague*, 489 U.S at 311. This Court has expressed doubt that many such rules have yet to emerge, *Teague*, 489 U.S. at 313, and the rule announced by the District Court in this case certainly is not one of them because it is not among the "small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Goeke v. Branch*, 115 S. Ct. 1275, 1278 (1995), *quoting Graham*, 506 U.S. at 478 (internal quotation marks omitted). "[I]t has none of the primacy and centrality," *Saffle*, 494 U.S. at 495, of a rule which would come under the second exception, the classic example of which is the right to counsel adopted in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Saffle*, 494 U.S. at 495, *Teague*, 489 U.S. at 311, *quoting Mackey v. United States*, 401 U.S. 667, 693-94 (1969) (separate opinion of Harlan, J.). As this Court observed in *Sawyer*, "*[a]ll* of [its] Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense," 497 U.S. at 243 (emphasis added), yet it cannot all fall within the second exception. Just as *Sawyer* held that *Caldwell* did not come within that exception, so the Court should now hold that petitioner's proposed rule does not.

B. Gray's "Sorrell Murders" Claim Is Without Merit.

It follows from what already has been said that, even apart from consideration of the "new rule" doctrine, Gray's claim is directly contrary to existing precedent,

and thus should not be imposed on the States, absent strong, constitutionally-based policy considerations in its favor. Such policy considerations, however, are all strongly against adoption of Gray's proposed rule.

As the Fourth Circuit observed, if this Court were to adopt Gray's rule, "federal courts would be thrust deep into state criminal proceedings . . . [deciding] precisely the type of question that has traditionally been left to the States." (J.A. 368), *citing Herrera v. Collins*, 113 S. Ct. 853, 864 (1993). Such a decision would impose a dramatic new constitutional mandate for detailed discovery in state criminal cases.[12]

In addition, as the Fourth Circuit correctly held, "Petitioner's contention rings hollow on its facts." 58 F.3d at 66. The only penalty phase evidence the reliability of which Gray questions is the testimony of Melvin Tucker, which *was disclosed* to him in advance. Gray never has even alleged that there were any factual inaccuracies in the evidence with which he claims to have been surprised. For the reasons discussed in Argument II of this

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[12] Indeed, in the instant case, advanced disclosure of the evidence introduced by the prosecution to prove the nature of the Sorrell murders would not have revealed the information which Gray claims proved his innocence of those crimes. That information, not disclosed before trial because it simply was not exculpatory evidence, was not introduced by the prosecution in Gray's trial, and could not have been brought out on cross-examination within the scope of the direct examinations that were conducted. Gray's trial attorneys admitted that they interviewed Slezak by telephone on the evening before the penalty phase (J.A. 149, 171), but did not uncover this information. Essentially, Gray claims a constitutional right to conduct a discovery deposition of Slezak, much as he essentially did when he examined Slezak in the federal evidentiary hearing.

brief, none of the information, singly or in combination, which Gray claims he would have investigated and produced at trial had he had advance notice of all the Commonwealth's aggravation evidence would have presented any reasonable probability of a different outcome at trial. Thus, even with the benefit of hindsight, extended investigation time, use of federal civil discovery rules, and a quarter-million dollars in federal funding for his investigation:[13] "Petitioner has advanced no meaningful way in which he would have proceeded any differently at the penalty phase had he known about the photographs, the autopsy report, and the like, before Thursday evening; indeed, it seems likely that Petitioner's case would have unfolded in much the same fashion that it did." 58 F.3d at 66.

For this reason, even if this Court were to disapprove of the way in which the prosecutor responded to Gray's inquiry concerning the penalty phase evidence, it could not find that the prosecutor's conduct infected the entire proceeding with unfairness under the *Donnelly* due process standard. "[T]he appropriate standard for review is 'the narrow one of due process, and not the broad exercise of supervisory power.' " *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

Finally, even without the "Sorrell murders" evidence, the other evidence of Gray's "future dangerousness," especially the testimony of his prior shooting victim, Ronald Whitte, was absolutely overwhelming, and it is hard to imagine how the jury could have reached any other conclusion than to sentence Gray to death. For this

[13] A review of the case file discloses that the District Court granted petitioner's request for attorney's fees and expenses in excess of $240,000.

reason, any arguable error in admission of the "Sorrell murders" evidence had no "substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993), and was therefore harmless.

C. The "Sorrell Murders" Claim, As Presented In Federal Court, Is Procedurally Barred.

Gray's present "Sorrell murders" claim, that the prosecutor misled him as to the issues at sentencing, was never argued before in any court. It thus is technically not exhausted, but relief would presently be barred in State court under Virginia Code § 8.01-654(B)(2), and also under newly enacted Virginia Code § 8.01-654.1. It thus should be deemed barred from federal habeas corpus review as well. *Teague*, 489 U.S. at 298-99; *Bassette v. Thompson*, 915 F.2d 932, 936 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991).

Even the version of the "Sorrell murders" claim which Gray presented in the lower federal courts, however, was procedurally barred, as Judge Hall's concurring opinion in the Fourth Circuit correctly pointed out. (J.A. 374-75).

The evidence adduced in District Court showed that the suspicions about Timothy Sorrell in connection with the murders of his wife and daughter were widely publicized *even before Gray's trial* and that *trial counsel* could have investigated and presented these facts in support of a motion for a new trial. A claim based on these facts thus would be barred in state habeas under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), and thus is barred in federal habeas

as well. *Teague*, 489 U.S. at 298-99; *Bassette*, 915 F.2d at 936.

The state habeas claim pertaining to the Sorrell murders, moreover, was based only on the record of trial; the supporting evidence upon which Gray relied in federal court never was proffered to the state courts. In oral argument on the respondent's motion to dismiss in the Circuit Court of the City of Suffolk, Gray's state habeas counsel expressly characterized this claim as one of two "claims of law *for which no evidence is necessary*." (J.A. 110, *emphasis added*). The first of the claims thus characterized pertained to the use of the testimony of Jeremiah Smallwood.[14] The second claim thus characterized, however, was "the introduction of the testimony and evidence concerning the Sorrell murders in Chesapeake." (J.A. 114).

Later in his argument, apparently as an afterthought, state habeas counsel suggested that evidence could be taken on this claim to show its effect on the jury, but contrasted this claim from the ineffective assistance of counsel claims which required evidence to establish the claims themselves. (J.A. 115; C.A.A. 2922).

The state habeas court denied Gray's Sorrell claim as having been adjudicated on direct appeal. (J.A. 117). In his petition for appeal of the habeas ruling to the Supreme Court of Virginia, Gray urged the Supreme Court to reexamine its ruling on direct appeal rejecting the claim as a matter of law. He argued the merits of the claim as a matter of law, but *never contended that the circuit court should have taken evidence on the claim*. (J.A. 122-24).

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[14] The District Court denied relief on that claim. (C.A.A. 197).

Thus, in state court, the only evidence Gray ever proffered as material to the Sorrell claim was evidence pertaining to its effect on the jurors. Even the rejection of this proffer, however, was waived on Gray's state habeas appeal when it was not assigned as error. *See Coleman v. Thompson*, 501 U.S. 722 (1991).

Because Gray presented his Sorrell claim in state court as one which required no supporting evidence beyond what appears in the record, the District Court erred in granting relief upon evidence proffered for the first time in federal court. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Anderson v. Harless*, 459 U.S. 4, 7-8 (1982); *see Gray*, (J.A. 374-75) (Hall, J., concurring).

The District Court concluded that the refusal of the State habeas court to hold an evidentiary hearing on Gray's claim constituted "cause" for this default. This ruling was wrong for several reasons. First, Gray *affirmatively told the state court that no additional evidence was needed*. Gray's default is thus even more egregious than the default in *Tamayo-Reyes*. Second, Gray never alleged in his state habeas petition most of the facts relied on in Federal court. State habeas law is similar to federal habeas law – one must *allege* specific facts showing entitlement to relief before he is entitled to an evidentiary hearing. *Compare Bassette v. Thompson*, 915 F.2d at 940-41, with *Penn v. Smyth*, 188 Va. 367, 370-71, 49 S.E.2d 600, 601 (1948). Third, Gray's tentative offer in State circuit court to present evidence "of the effect on the jurors" of the Sorrell evidence is not the same evidence upon which he relied in Federal court, and thus the District Court was wrong to speculate that he might also have presented the evidence heard in Federal court. Fourth, any contention that evidence should have been heard in support of the

claim in State circuit court was waived by Gray's failure to argue this point on appeal to the Supreme Court of Virginia. *See Coleman, supra.*

II. GRAY'S SO-CALLED *BRADY* CLAIM IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE LAW, IS NOT PROPERLY BEFORE THIS COURT, AND IS PROCEDURALLY BARRED.

A. The Claim Has No Merit.

The District Court correctly concluded, in its April 1, 1993 Order, that Gray's claim that the prosecution had withheld exculpatory evidence with respect to the "Sorrell murders," in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), was procedurally barred and without merit. (C.A.A. 194). It then erroneously revisited the substance of this claim in its treatment of his "Sorrell murders" claim. The District Court allowed Gray at the evidentiary hearing to examine the lead detective in the Sorrell murders investigation and require him to explain all the reasons why the police initially had regarded Timothy Sorrell as a suspect in the murder of his wife and daughter. Predictably, the detective related suspicions, hearsay, and raw investigative information, much of which was tentative, challenged, and later discredited. The District Court also allowed Gray to present allegations made by the victims' parents in pleadings in an interpleader action over the proceeds of Lisa Sorrell's life insurance policy. Although Gray was unable to distill from this miasma of rumor, suspicion, and raw speculation any hard, admissible evidence that would tend to show Gray was *not* guilty of the Sorrell murders, the District Court somehow mistook it for exculpatory evidence.

In *Wood v. Bartholomew*, 116 S. Ct. 7 (1995) (*per curiam*), this Court corrected a misapplication of its *Brady* jurisprudence in which the Ninth Circuit had seized upon undisclosed information favorable to the defense which was *inadmissible* under State law, and speculated that, had this information been disclosed, it somehow would have led to the discovery of admissible exculpatory evidence, *even though no such evidence was produced at the federal evidentiary hearing.*

The *Brady* aspect of Gray's case is much like the *Brady* claim in *Wood*. Much of the "information" which the District Court characterized as "suggest[ing] that Mr. Gray was not involved in the Sorrell murders" (J.A. 345) was, like the polygraph results in *Wood*, "not 'evidence' at all." 116 S. Ct. at 10. The balance of it was either immaterial under the standard established in *United States v. Bagley*, 473 U.S. 667 (1985), of equal access to Gray and thus not required to be disclosed under *Brady*,[15] or simply wrongly interpreted by the District Court. Thus, none of this information could justify habeas corpus relief even if Gray's *Brady* claim were not procedurally barred.

Specifically, information that Timothy Sorrell had been the primary suspect (J.A. 344), that he was designated as the suspect on a forensic laboratory report (J.A. 344), or that Lisa Sorrell's parents filed a lawsuit to prohibit Timothy Sorrell from collecting the proceeds of a life

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[15] *See Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994), *cert. denied*, 116 S. Ct. 37 (1995); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990). *Accord, May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 770 (1991); *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir.), *cert. denied*, 110 S. Ct. 322 (1989); *United States v. Hicks*, 848 F.2d 1, 4 (1st Cir. 1988); *United States v. LeRoy*, 687 F.2d 610, 618-19 (2nd Cir. 1982); *United States v. Craig*, 573 F.2d 455, 492 (7th Cir. 1977).

insurance policy and made various hearsay accusations in their pleadings in that case (J.A. 344), were all speculation and hearsay, and clearly would not have been admissible under Virginia law to contradict Tucker. *See, e.g., Weller v. Commonwealth*, 16 Va.App. 886, 890-91, 434 S.E.2d 330, 333 (1993). *See also Cross v. Commonwealth*, 195 Va. 62, 74, 77 S.E.2d 447, 453 (1953).

The life insurance policy on Lisa Sorrell payable to Timothy had been taken out by her parents. (J.A. 284). This circumstance, alone or in combination with the other admissible evidence, certainly would not have presented a reasonable probability that the outcome of the penalty proceeding would have been different. *See Bagley*, 473 U.S. at 682. The same is true of Timothy Sorrell's allegedly "strange" questions to the police when first informed that the victims' bodies had been found (J.A. 344), *see Evans-Smith v. Taylor*, 19 F.3d 899, 908 n. 23 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 298 (1994), and the fact that he supposedly "ignored" Herbert Nixon when he passed him walking in Greenbriar Mall while both were there looking for Lisa and Shanta Sorrell on the night they disappeared.

Other information which the District Court regarded as suggesting Gray's innocence of the Sorrell murders was simply not information required to be revealed under *Brady*. For example, the existence or non-existence of published newspaper articles of the sort that the District Court believed Tucker had referred to in his testimony, *i.e.*, articles published shortly after the McClelland murder in May 1985, but depicting photographs of the

victims of the Sorrell murders in December 1984[16] obviously was not information that was *suppressed* by the prosecution, *see Brady*, 373 U.S. at 87, but was equally available to the defense, and therefore not something which the prosecution was required to disclose. *Stockton*, 41 F.3d at 927; *Wilson*, 901 F.2d at 381. Had they chosen to do so, Gray's counsel could have researched the existence or non-existence of such newspaper articles and brought that to the trial court's attention in support of a motion for new trial.

The District Court also referred to an allegation that Timothy Sorrell had told friends, on the night his wife and child disappeared and before their bodies had been found, that they were dead. (J.A. 344). The District Court's page references to the transcript of the evidentiary hearing merely refer to *an allegation* in the suit papers filed by the victim's parents to prevent Timothy Sorrell from collecting the proceeds of a life insurance policy. (J.A. 195-99). Obviously, allegations made in a civil suit between two extraneous parties would not have been admissible evidence in Gray's capital murder trial.

The evidence adduced at the evidentiary hearing, moreover, indicated that, in all likelihood, this report originated from false information given to the police by Ronald Cole and Michelle Davis, who apparently hoped to collect the advertised $10,000 reward for information leading to the apprehension of the killer of Lisa and Shanta Sorrell. (J.A. 214-21, 279-80; C.A.A. 926) (see pp. 18-19 of this brief). The false information supplied by Cole and Davis was not required to be disclosed under

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[16] The District Court erred when it found that Tucker's trial testimony necessarily referred to a newspaper article published in May after the McClelland murder. (See pp. 47-48 of this brief).

Brady. The prosecution has no duty to make a detailed accounting of its investigation, *United States v. Agurs*, 427 U.S. 97, 109 (1976), *quoting Moore v. Illinois*, 408 U.S. 786, 795 (1972), nor to disclose preliminary, challenged, or speculative information. *Agurs*, 427 U.S. at 109, n. 16.

Many other "findings" by the District Court concerning information which supposedly would have exculpated Gray of the Sorrell murders are clearly erroneous. The District Court clearly erred in finding Melvin Tucker was a man "who had escaped prosecution for capital murder in exchange for his testimony" (J.A. 343), and in implying that the only reason Gray was prosecuted for capital murder rather than Tucker was because Tucker agreed to testify. (J.A. 339, 343). Virginia law permitted only the actual trigger man to be prosecuted for capital murder and executed. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980); Va. Code § 18.2-18. As the Supreme Court of Virginia found on direct appeal,[17] the record was replete with circumstantial evidence corroborating Tucker's testimony that Gray, and not Tucker, was the trigger man. Although federal law required the District Court to defer to these findings of fact, *Cabana v. Bullock*, 474 U.S. 376, 388 n. 5 (1986); *Sumner v. Mata*, 449 U.S. 539, 546-49 (1981); 28 U.S.C. § 2254(d), it ignored them, without explanation.

The District Court also clearly erred in concluding that Timothy Sorrell's statement that he had been at the Greenbriar Mall on the evening of the murders tended to exculpate Gray. (J.A. 344). Other than the admittedly false reports by Cole and Davis, the only evidence of Timothy

[17] See p. 3 of this Brief.

Sorrell's presence at Greenbriar Mall on the night of December 5 was the testimony of the victim's mother that Timothy and the victim's father simultaneously went in separate cars to Greenbriar Mall late on the night of December 5 to search for Lisa and Shanta, who had been missing for several hours at that point. Sorrell and his father-in-law left at about 10:30 and returned about ten minutes later. (J.A. 288-89).

Similarly, the District Court clearly erred in concluding that Timothy Sorrell had "changed his alibi throughout the murder investigation." (J.A. 344). The victim's mother testified that, after Lisa and Shanta left her house about 4:45 p.m. to go to their own home, Timothy Sorrell called the mother at about 6:30 to ask where his wife and daughter were, because they were not at home. He called again about 7:30. At the time of the second call, Mrs. Nixon assumed that Timothy was calling from Chesapeake Technical School, where she understood he normally went to evening classes on Wednesday nights. Timothy, however, did not say where he was calling from and she did not ask. (J.A. 291). She later learned that Timothy had told the police that he had spent the evening at the home of a friend. (J.A. 293). Detective Slezak testified that Timothy had told the police he had been to Chesapeake Technical School on the evening of December 5, and that his cousin was supposed to be there, but did not recall Timothy ever saying that he had stayed at Chesapeake Technical School from 7:30 until 10:00 that night. Sorrell had told the police he spent the bulk of the evening at the home of a female friend, and when the police investigated this alibi, the friend and her husband corroborated Timothy's alibi. (J.A. 187-88).

The District Court also clearly erred in concluding that no such newspaper article as Melvin Tucker referred

to in his trial testimony had been introduced into evidence (J.A. 343), and inferring that the supposed absence of such evidence supported Gray's contention that Tucker's testimony was false. Tucker's testimony is equally susceptible to an interpretation that, while searching through a collection of newspapers for the current one with news about the McClelland crime, Gray came across an old newspaper he had saved with the photograph of Lisa Sorrell in it. (J.A. 22-23). Respondent introduced two newspaper articles which could have been the ones Gray showed Tucker if the latter interpretation is correct. (C.A.A. 878, 879). The District Court, which did not see or hear Tucker's trial testimony firsthand, clearly had no basis for arbitrarily adopting the interpretation most favorable to Gray.

B. The Claim Is Doubly Defaulted.

There are two other equally compelling reasons to reject Gray's *Brady* claim. First, as the District Court had correctly found on April 1, 1993 (C.A.A. 194), Gray's *Brady* claim never was raised at trial, on direct appeal, or in state habeas corpus, and thus would currently be barred from state habeas relief under Va. Code § 8.01-654(B)(2), and barred from federal habeas relief under *Teague*, 489 U.S. at 298-99.[18]

[18] Indeed, the evidence at the federal evidentiary hearing showed that the so-called "exculpatory" evidence, consisting of police suspicions about Timothy Sorrell, was widely publicized well before Gray's death sentence became final in the Circuit Court, and thus could have been investigated and presented as the basis of a *Brady* claim in support of a motion for a new trial and on direct appeal. (J.A. 281-83; 218; C.A.A. 926-30). Nevertheless, trial counsel admitted they did not present these matters in support of a *Brady* claim in a motion for a new trial. (J.A. 145-50, 178-89). The *Brady* claim thus would now be barred under *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), for Gray's failure to present it at trial and on direct appeal, and under Virginia Code § 8.01-654(B)(2) for Gray's failure to present it in state habeas corpus. That statute applies not only to facts actually known, but to facts reasonably available to a petitioner at the time he filed a previous petition. *Waye v. Murray*, 884 F.2d 765, 766 (4th Cir.), *cert. denied*, 492 U.S. 936 (1989).

Second, Gray never appealed the District Court's April 1, 1993, rejection of his *Brady* claim as a free-standing basis for habeas relief. While he mentioned his *Brady* theory in a footnote in support of his argument on the Sorrell murders (Opening Brief for Petitioner-Appellee in Fourth Circuit, p. 30, n. 10), such casual treatment does not preserve it as an independent claim. Federal Rule of Appellate Procedure 28(a)(3) requires that an appellant's brief contain an explicit statement of the issues to be presented in the appeal. Gray's statement of the issues presented in his Fourth Circuit brief contained no *Brady* claim regarding the "Sorrell murders" evidence.[19] (Opening Brief for Petitioner-Appellee in Fourth Circuit, pp. 2-3). This claim was neither raised nor addressed in the Court of Appeals, and thus is not properly before this Court. *See Yee v. Escondido*, 503 U.S. 519, 533 (1992); *American National Bank v. Haroco, Inc.*, 473 U.S. 608 (1985).

[19] His Issue III in the Fourth Circuit was an unrelated *Brady* claim pertaining to supposed impeachment material of Commonwealth's witness Jeremiah Smallwood.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted:

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